

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MARQUES PHILLIPS and CYNTHIA
PHILLIPS,

Plaintiffs,

v.

NO. CIV. S-04-0377 FCD PAN

MEMORANDUM AND ORDER

CITY OF FAIRFIELD, CHIEF OF
POLICE WILLIAM GRESHAM,
OFFICER MARK SCHRAER, OFFICER
CHAD TIGERT, OFFICER STEVE
TROJANOWSKI, JR., OFFICER MIKE
BEATTY, OFFICER MATTHEW
THOMAS, OFFICER STEPHEN RUIZ,
OFFICER TROY OVIATT, OFFICER
JEREMY NIPPER, OFFICER FRANCO
CESAR, OFFICER CADE BECKWITH,
and DOES 1 through 13,

Defendants.

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This matter is before the court on the City of Fairfield's
("city"), Chief William Gresham's ("Gresham"), and named City of
Fairfield police officers' ("officers") motion for summary
judgment or, in the alternative, summary adjudication of the

1 issues. Marques Phillips was arrested on February 1, 2003.
2 Plaintiffs Marques Phillips and Cynthia Phillips filed this
3 action on February 2, 2004, alleging both federal and state law
4 claims arising out of the February 1, 2003 arrest. On December
5 2, 2005, the court heard oral argument on the matter. For the
6 reasons set forth below, defendants' motion is GRANTED in part
7 and DENIED in part.

8 **BACKGROUND¹**

9 On January 31, 2003, Marques Phillips ("Marques")² was
10 stopped by Officer Steve Trojanowski, Jr. ("Trojanowski") and
11 another officer in the 7-11 parking lot in Fairfield, California
12 for reckless driving. (UF ¶ 1; Dep. of Marques Phillips,
13 attached as Ex. F to Pls.' Opp'n to Defs.' Mot. for Summ. J.,
14 filed Nov. 5, 2005, at 42:10-13 ("M. Phillips Dep.")). Marques
15 denies that he was driving recklessly or "bouncing" as the
16 officers alleged. (UF ¶¶ 1, 3; M. Phillips Dep. at 41:24-42:5).
17 Marques had four other people in his car. (UF ¶ 2). The
18 officers made Marques and the passengers step out of the car.
19 (UF ¶ 4). The officers searched the car and found a bag of

20 ¹ Unless otherwise noted, the facts herein are
21 undisputed. (See Pl.'s Resp. to Def.'s Am. Separate Stmt. of
22 Undisp. Facts ("UF"), filed Nov. 5, 2005). Where the facts are
in dispute, the court recounts plaintiffs' version of the facts.

23 Defendants object to various pieces of evidence that
24 plaintiff presents in support of his motion. Much of the
25 evidence that defendants object to is immaterial to the court's
26 analysis of the summary judgment motion. To the extent that the
evidence is relevant, the court finds that defendants' objections
are without merit.

27 ² Due to the shared last names of the plaintiffs, the
28 court will refer to each plaintiff by his or her first name in
order to avoid confusion.

1 marijuana. (UF ¶ 5). The officers arrested Marques and towed
2 his car. (UF ¶ 6). His parents retrieved his car for him from
3 the tow yard the next day. (UF ¶ 7).

4 On February 1, 2003, Marques and some friends were waiting
5 for a pizza he had ordered at Little Ceasar's. (UF ¶ 8). While
6 waiting, Marques noticed some police in the area of North Texas
7 Street and went to check out what was going on. (UF ¶¶ 9-10).
8 He approached the area where the police were. (UF ¶ 10). The
9 police asked Marques if he owned a Blazer. (UF ¶ 11). He
10 responded that he did not. (UF ¶ 11). The officers asked for
11 his car keys and appeared to use them to open a Blazer. (UF ¶
12 12). The officers found drugs in the Blazer. (UF ¶ 13). The
13 officers arrested Marques and confiscated his car keys. (UF ¶
14 13).

15 Later that afternoon, Marques called a locksmith to have new
16 keys made for his car. (UF ¶ 14). Marques' mother, Cynthia
17 Phillips ("Cynthia"), agreed to drive him to meet the locksmith.
18 (UF ¶ 15). About 1½ to 2 hours after Marques called the
19 locksmith, Cynthia drove him in her car to meet the locksmith.
20 (UF ¶ 16). Cynthia parked at the Shell gas station, but Marques
21 told her it was not safe. (M. Phillips Dep. at 53:6-9). They
22 drove to the Jack-in-the-Box parking lot at 1972 North Texas
23 Street, which was near the parking lot where Marques' car was
24 parked. (UF ¶ 17). Marques told Cynthia to park under a street
25 light because it was dark by that time. (UF ¶ 19). Cynthia
26 backed into a parking space. (UF ¶ 20). Marques could see his
27 car from that angle. (UF ¶ 21; M. Phillips Dep. at 53:13-15).

1 The area of North Texas and East Tabor Streets, the same
2 area where Cynthia and Marques were, is known for high levels of
3 narcotics sales. (UF ¶ 23). This area is considered dangerous
4 by Fairfield Police and Fairfield citizens. (UF ¶ 23). On this
5 same night, members of the Crime Suppression and Narcotics Team
6 from the Fairfield Police Department were conducting undercover
7 narcotics purchases, called "buy/bust" operations, in areas known
8 for a high level of narcotics sales. (UF ¶¶ 22, 25). Police
9 consider these to be very dangerous operations for the police
10 officers involved. (UF ¶ 25). Prior to sending an undercover
11 officer into this area to purchase narcotics, Trojanowski drove
12 into the area to check out the site and look for suspected or
13 known drug dealers. (UF ¶ 26). Undercover officers would then
14 be sent in to attempt to purchase narcotics. (UF ¶ 26). Members
15 of the Crime Suppression Unit and Narcotics Team taking part in
16 the operation were Officers Mike Beatty, Cade Beckwith, Franco
17 Cesar, Mathew Thomas, Troy Oviatt, and Stephen Ruiz. (UF ¶ 26).
18 Officer Jeremy Nipper was stationed in a surveillance van. (UF ¶
19 26).

20 Defendants contend that the Fairfield Police Department had
21 just received a call regarding a male who was loitering in the
22 Jack-in-the-Box parking lot who was in possession of a firearm.
23 (UF ¶ 27). Defendants also contend that the suspect fit the
24 general description of Marques and that Trojanowski heard this
25 warning dispatch. (UF ¶ 27). Plaintiffs present evidence that,
26 at the very least, demonstrate inconsistencies regarding whether
27 any of the officers, including Trojanowski, remembered hearing
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1 this dispatch or the description of the suspect in the dispatch.³

2 Approximately fifteen to twenty minutes after Marques and
3 Cynthia arrived, Marques got out of the car to go get a drink.
4 (UF ¶ 28). He crossed the parking lot to go to the Liquor Tree
5 Store. (UF ¶ 29). He returned to the car where he and his
6 mother sat for another thirty to forty minutes. (UF ¶ 30).
7 Marques saw a white van pull into the parking lot where his car
8 was parked. (UF ¶ 31). He assumed it was the locksmith. (UF ¶
9 31). Marques got out of the car to contact the driver of the
10 van. (UF ¶ 32). When he reached the van, however, it was not
11 the locksmith. (UF ¶ 33). He turned around and headed back to
12 his mother's car, which was located on the other side of the
13 Jack-in-the-Box parking lot. (UF ¶¶ 33-34).

14 At approximately 8:00 p.m. that evening, Trojanowski was
15 parked in the parking lot of 1972 North Texas Street near the
16 Shell Station and Jack-in-the-Box. (UF ¶ 35). This parking lot
17 is a high crime, high drug sales area. (UF ¶ 36). Trojanowski
18 saw Marques walking around the parking lot from the area of the
19 Shell Station to the Liquor Tree Store and back again to the
20 parked car. (UF ¶ 37). Trojanowski recognized Marques as
21 someone who was previously arrested for possession of marijuana
22 twice in the last twenty-four hour period. (UF ¶ 38).

23 Defendants contend that Trojanowski knew from personal
24 experience that Marques had threatened violence against the
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26 ³ Plaintiffs also contend that evidence of this dispatch
27 was determined to be inadmissible at the Discovery Hearing on
28 October 13, 2005. Disc. Hr'g, attached as Ex. A to Pls.' Opp'n
to Defs.' Mot. for Summ. J., filed Nov. 5, 2005, at 28:23-29:17
("Disc. Hr'g").

1 police in prior arrests. (UF ¶ 39). Plaintiffs dispute this
2 contention. (M. Phillips Dep. at 50:12-16; Decl. of Marques
3 Phillips in Opp'n to Defs.' Mot. for Summ. J., filed Nov. 5,
4 2005, ¶ 3 ("M. Phillips Decl.")). Defendants assert that
5 Trojanowski, upon seeing Marques walk back and forth across the
6 parking lot, believed Marques to be loitering in violation of
7 California Health and Safety Code § 11532. (UF ¶ 40).
8 Defendants further assert that Trojanowski believed Marques could
9 be the armed suspect of the earlier dispatch. (UF ¶ 40).
10 Plaintiffs dispute these assertions. (Disc. Hr'g at 28:23-
11 29:17). Defendants contend that in Trojanowski's mind Marques'
12 actions seemed deliberately fashioned to undermine the officers'
13 buy/bust operation, (UF ¶ 40), and that because of the danger
14 presented to Trojanowski, the decision was made to arrest Marques
15 with a "high-risk stop" procedure. (UF ¶ 41). Plaintiffs also
16 dispute these contentions. (Disc. Hr'g at 28:23-29:17). A high-
17 risk stop requires police to have their guns drawn as they order
18 a suspect to get down on the ground. (UF ¶ 42). This is done to
19 assure officer safety, safety of the community and safety of the
20 suspect. (UF ¶ 42).

21 When Marques entered the parking lot and approached the
22 passenger side of his mother's car, he looked to his left and saw
23 Trojanowski. (UF ¶ 43). As he walked, he heard somebody say
24 "get on the ground." (UF ¶ 43; M. Phillips Dep. at 58:7-9,
25 62:11-12, 63:3-5). Marques did not know who it was, but he
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1 obeyed the command and laid down face first.⁴ (Pl.'s Am. Stmt.
2 of Disp. Facts ("SDF"), filed Nov. 5, 2005, ¶ 1). Cynthia had
3 been watching Marques walk across the parking lot, but when
4 Marques laid down on the ground, she could no longer see him.
5 (UF ¶ 47). Marques was about five feet from his mother's car.
6 (M. Phillips Dep. at 63:24-25-64:1). Marques turned his head and
7 saw Trojanowski training his gun on him. (SDF ¶ 2). Trojanowski
8 also trained his gun on Cynthia. (SDF ¶ 3). Trojanowski told
9 Cynthia to stay in her car and keep her hands up. (SDF ¶¶ 4, 5).
10 Marques saw Trojanowski advance quickly toward him. (UF ¶ 48).
11 Marques asked Trojanowski what he had done, but received no
12 answer. (UF ¶ 47). When Trojanowski reached Marques, he stomped
13 the back of his neck. (SDF ¶ 6). Marques screamed in pain.
14 (SDF ¶ 7). Trojanowski continued to train his gun on both
15 Marques and Cynthia. (SDF ¶ 9). He then dropped down on top of
16 Marques and drove his knee into his back. (SDF ¶ 8).
17 Trojanowski then picked Marques up and slammed him back into the
18 ground. (SDF ¶ 10). Marques continued to scream in pain, but
19 did not resist Trojanowski. (SDF ¶¶ 11, 12). Cynthia then saw
20 six to eight officers approach Marques. (UF ¶ 51). Trojanowski
21 and Officer Tigert placed handcuffs on Marques. (UF ¶ 57).
22 Officer Ruiz and another officer helped put REPP restraints on
23 Marques' ankles.⁵ (Decl. of Officer Stephen Ruiz in Supp. of

25 ⁴ Defendants assert that Marques first dropped to his
26 knees and that Trojanowski placed his foot on Marques' upper back
to push him to the ground. (See Defs.' Am. Sep. Stmt of Undisp.
27 Facts ("Defs.' ASSUF"), filed Oct. 18, 2005, ¶¶ 44, 50).

28 ⁵ Defendants contend that Marques started kicking his
(continued...)

1 Defs.' Mot. for Summ. J., filed Oct. 18, 2005, at ¶ 9). The
2 officers tied Marques' handcuffs to his ankle cuffs. (SDF ¶ 13).
3 Marques did not resist the officers. (SDF ¶ 14). The officers
4 punched, clubbed, kicked, and slammed Marques into the ground
5 multiple times. (SDF ¶ 15). Marques continued to scream in pain
6 and passed out. (SDF ¶¶ 16-17). The officers continued to
7 punch, club, kick, and slam Marques onto the ground. (SDF ¶ 18).
8 A young officer told Cynthia she could get out of the car. (UF ¶
9 52). Sergeant Schraer, who was standing at the front driver's
10 side of Cynthia's car, told the officers to keep Cynthia back and
11 out of the way. (UF ¶ 53). The officers "moved in toward [her]"
12 and she "moved back behind [her] car door." (Decl. of Cynthia
13 Phillips in Opp'n to Defs.' Mot. for Summ. J., filed Nov. 5,
14 2005, ¶ 8 ("C. Phillips Decl."); Dep. of Cynthia Phillips,
15 attached as Ex. E to PLS.' Opp'n to Defs.' Mot. for Summ. J.,
16 filed Nov. 5, 2005, at 88:1-2; 143:7-10. ("C. Phillips Dep.")).
17 Cynthia then stepped onto the door jamb to see over her car. (C.
18 Phillips Dep. 88:4-7). Cynthia could see that the officers were
19 hitting Marques with their batons. (C. Phillips Dep. 88:7-12,
20 17-89:19, 91:19-92:18). The officers carried Marques to a police
21 car by his restraints.⁶ (SDF ¶ 20).

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23 ⁵(...continued)
24 legs which warranted the use of ankle restraints. (Defs.' ASSUR
¶ 58).

25 ⁶ Defendants contend that Marques "was helped" to the
26 police car by Officer Beckwith and another officer. (Defs.'
27 ASSUR ¶ 58). Defendants also contend that in her deposition,
28 Cynthia said Marques was carried by his arms and legs, not his
restraints. (Defs.' Opp. to PASDF 20). Plaintiffs assert that
Cynthia stated that the officers carried Marques by the top of
(continued...)

1 The officers "threw" Marques into the police car. (SDF ¶
2 21). An officer got into the police car and struck Marques while
3 he was handcuffed and anklecuffed. (SDF ¶ 22). Marques was
4 crying and screaming in pain. (SDF ¶ 23). In order to remove
5 him from the crowd that was gathering around the area of
6 Cynthia's car, the officers then took Marques to the Food Max
7 parking lot in front of Hollywood Video. (UF ¶ 59). The
8 officers "snatched" him out of the police car by the "straps."
9 (M. Phillips Dep. 75:22-76:2). The officers patted him down,
10 lifted his shirt, and took off his shoes and socks. (UF ¶ 61).
11 The officers did not find any contraband on Marques. (SDF ¶ 25).
12 The officers then transported him to the County Jail. (UF ¶ 62).
13 A booking photo of Marques was taken at the jail. (UF ¶ 63).

14 While the officers were carrying Marques to the car,
15 Sergeant Schraer came around to where Cynthia was, and the two
16 engaged in conversation. (UF ¶ 55). Her view was blocked by the
17 car and by Sergeant Schraer during the conversation. (UF ¶ 55).
18 Cynthia asked Sergeant Schraer two times what Marques did wrong,
19 and both times he yelled back that Marques sells drugs. (SDF ¶¶
20 26-29). Cynthia asked him the same question a third time and
21 Sergeant Schraer responded that Marques was loitering. (SDF ¶¶
22 30-31). Cynthia told Sergeant Schraer that Marques was not
23 loitering because he was with her waiting for the locksmith.

24
25 ⁶(...continued)
26 his arms and legs. See UF ¶ 13. The court, however, does not
27 have that particular deposition page. The deposition testimony
28 does state that Marques was restrained by his hands and his
ankles, and the two sets of restraints were tied together. (C.
Phillips Dep. at 93:7-13). Cynthia also testified that Marques
was carried or lifted up. (Id. at 93:21-94:5).

(SDF ¶ 32). Sergeant Schraer then said that Marques identified an undercover police officer. (SDF ¶ 33). He told her that she should know how serious it was to identify an undercover police officer because her husband was a police officer. (SDF ¶ 34). Cynthia told him that he was wrong. (SDF ¶ 35). Sergeant Schraer shrugged his shoulders and said that he knew. (SDF ¶ 36). Cynthia was crying. (SDF ¶ 37). She did not see Marques again because he was gone by the time the conversation ended. (UF ¶ 55). Cynthia was never touched by any of the officers. (UF ¶ 56).

The officers' actions caused Marques extreme physical and mental pain. (SDF ¶¶ 43-44). Marques had to receive medical attention for his physical pain. (M. Phillips Dep. at 80:13-83:6, 85:3-10). The officers' actions caused Cynthia extreme mental pain and physical manifestations for which she had to receive medical attention. (SDF ¶¶ 46-47).

STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

Under summary judgment practice, the moving party

[A]lways bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the

1 nonmoving party will bear the burden of proof at trial on a
2 dispositive issue, a summary judgment motion may properly be made
3 in reliance solely on the 'pleadings, depositions, answers to
4 interrogatories, and admissions on file.'" Id. at 324. Indeed,
5 summary judgment should be entered against a party who fails to
6 make a showing sufficient to establish the existence of an
7 element essential to that party's case, and on which that party
8 will bear the burden of proof at trial. Id. at 322. In such a
9 circumstance, summary judgment should be granted, "so long as
10 whatever is before the district court demonstrates that the
11 standard for entry of summary judgment, as set forth in Rule
12 56(c), is satisfied." Id. at 323.

13 If the moving party meets its initial responsibility, the
14 burden then shifts to the opposing party to establish that a
15 genuine issue as to any material fact actually does exist.
16 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
17 585-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S.
18 253, 288-289 (1968). In attempting to establish the existence of
19 this factual dispute, the opposing party may not rely upon the
20 denials of its pleadings, but is required to tender evidence of
21 specific facts in the form of affidavits, and/or admissible
22 discovery material, in support of its contention that the dispute
23 exists. Fed. R. Civ. P. 56(e). The opposing party must
24 demonstrate that the fact in contention is material, i.e., a fact
25 that might affect the outcome of the suit under the governing
26 law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986),
27 and that the dispute is genuine, i.e., the evidence is such that
28 /////

1 a reasonable jury could return a verdict for the nonmoving party,
2 Id. at 251-52.

3 In the endeavor to establish the existence of a factual
4 dispute, the opposing party need not establish a material issue
5 of fact conclusively in its favor. It is sufficient that "the
6 claimed factual dispute be shown to require a jury or judge to
7 resolve the parties' differing versions of the truth at trial."
8 First Nat'l Bank, 391 U.S. at 289. Thus, the "purpose of summary
9 judgment is to 'pierce the pleadings and to assess the proof in
10 order to see whether there is a genuine need for trial.'" Matsushita,
11 475 U.S. at 587 (quoting Rule 56(e) advisory
12 committee's note on 1963 amendments).

13 In resolving the summary judgment motion, the court examines
14 the pleadings, depositions, answers to interrogatories, and
15 admissions on file, together with the affidavits, if any. Rule
16 56(c); SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir.
17 1982). The evidence of the opposing party is to be believed, and
18 all reasonable inferences that may be drawn from the facts placed
19 before the court must be drawn in favor of the opposing party.
20 Anderson, 477 U.S. at 255. Nevertheless, inferences are not
21 drawn out of the air, and it is the opposing party's obligation
22 to produce a factual predicate from which the inference may be
23 drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224,
24 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898 (9th Cir. 1987).

25 Finally, to demonstrate a genuine issue, the opposing party
26 "must do more than simply show that there is some metaphysical
27 doubt as to the material facts. . . . Where the record taken as a
28 whole could not lead a rational trier of fact to find for the

1 nonmoving party, there is no 'genuine issue for trial.'"

2 Matsushita, 475 U.S. at 586-87, 106 S. Ct. at 1356.

3 **ANALYSIS**

4 In the complaint, plaintiffs alleged violations of various
5 federal and state laws. In response to defendants' motion for
6 summary judgment,⁷ plaintiffs do not oppose defendants' motion
7 with respect to the following claims: (1) plaintiffs' claims
8 against Gresham, the officers, and the city brought under 42
9 U.S.C. § 1983 for all constitutional violations except the Fourth
10 Amendment claims; (2) plaintiffs' claims against Gresham and the
11 officers brought under 42 U.S.C. § 1981; (3) plaintiffs' claims
12 against the officers brought under Cal. Civ. Code § 51.7; (4)
13 plaintiffs' claims against Gresham and the officers brought under
14 Cal. Civ. Code § 52.1; (5) plaintiffs' claims against Gresham
15 based upon negligent infliction of emotional distress,
16 negligence, negligent selection, training, retention,
17 supervision, investigation, and discipline, and *respondeat*
18 *superior* liability for the actions of the officers; (6)
19 plaintiff's claims against the officers based upon negligence;
20 and (7) plaintiff's claims against the city based upon negligent
21 selection, training, retention, supervision, investigation, and
22 discipline.

23 Plaintiffs' remaining claims are (1) claims for relief under
24 42 U.S.C. § 1983 for Fourth Amendment violations by the officers,
25 Gresham, and the city; (2) claims for relief under state law

26
27 ⁷ Plaintiffs failed to respond to many of these claims in
28 their opposition. Plaintiffs further clarified their non-
opposition to the dismissal of these claims during the hearing
held December 2, 2005.

1 against the officers for intentional torts; and (3) a claim for
2 relief under state law against the city for *respondeat superior*
3 liability against the city for the conduct of the officers.
4 Defendants do not address plaintiffs' claims for intentional
5 infliction of emotional distress in their motion for summary
6 judgment. As such, plaintiffs' claims survive this motion and
7 will not be addressed by the court.

8 **A. Section 1983 Claims**

9 _____Plaintiffs Marques Phillips and Cynthia Phillips bring
10 claims against the officers, Gresham, and the city pursuant to 42
11 U.S.C. § 1983. Plaintiffs assert that the officers acted under
12 the color of law to deprive them of their Fourth Amendment
13 constitutionally protected rights to be free from unreasonable
14 search and seizure. Defendants move for summary judgment on the
15 ground that the claims fail as a matter of law and that the
16 officers are entitled to qualified immunity.

17 **1. Marques Phillips' Claims against Defendant Officers**

18 Plaintiff Marques Phillips asserts that defendant officers
19 violated his Fourth Amendment rights because they did not have
20 probable cause to arrest him and because they used excessive
21 force. Defendants contend that there was probable cause to
22 arrest plaintiff and that the officers used a minimal amount of
23 force to overcome plaintiff's resistance. Defendants also argue
24 that the officers are protected by qualified immunity.

25 **a. Probable Cause**

26 Plaintiffs assert that defendants had no probable cause to
27 arrest Marques Phillips. Plaintiffs' theory is that defendant
28 Trojanowski created or fabricated reasons to arrest Marques

1 Phillips. (Hr'g on Def.'s Mot. for Summ. J. ("SJ Hr'g"), heard
2 Dec. 2, 2005). Trojanowski was involved in all three arrests of
3 Marques Phillips that occurred within an approximately 24 hour
4 period. (Id.) In the arrest at issue in this case, according to
5 defendants, Marques Phillips was walking through an area where
6 defendant officers had set up a dangerous buy/bust operation.
7 (Id.) Defendants admit that part of the reason for the arrest of
8 Marques Phillips was the disruption or the potential disruption
9 of the buy/bust operation by the unknowing plaintiff as he walked
10 through the parking lot. (Id.)

11 "Probable cause exists when the police know 'reasonably
12 trustworthy information sufficient to warrant a prudent person in
13 believing that the accused had committed or was committing an
14 offense.'" United States v. Del Vizo, 918 F.2d 821, 825 (9th Cir.
15 1990) (quoting United States v. Delgadillo-Velasquez, 856 F.2d
16 1292, 1296 (9th Cir. 1988)). "In evaluating a custodial arrest
17 executed by state officials, federal courts must determine the
18 reasonableness of the arrest in reference to state law governing
19 the arrest." Pierce v. Multnomah County, 76 F.3d 1032, 1938 (9th
20 Cir. 1996) (internal quotations omitted). California law
21 requires that the court look to the totality of the circumstances
22 known by the officer to decide whether the officer's
23 determination of probable cause was reasonable. See People v.
24 Guajardo, 23 Cal. App. 4th 1738 (1994); Agar v. Superior Court,
25 21 Cal. App. 3d 24, 29 (1971).

26 Defendants assert that defendant officers had probable cause
27 to arrest plaintiff Marques Phillips. Plaintiff was arrested
28 pursuant to California Health and Safety Code Section 11532,

1 which sets forth the guidelines for unlawful loitering in a
2 public place with the intent to engage in narcotics related
3 activity. Specifically, defendants assert probable cause
4 pursuant to § 11532(b)(10) which provides that a factor "in
5 determining whether a person has the requisite intent to engage
6 in drug-related activity" is whether that person has engaged "in
7 any other behavior indicative of illegal drug-related activity"
8 in the past six months. Id. Defendants contend that because the
9 parking lot where plaintiff was arrested was known for high
10 levels of narcotics sales, and because Marques Phillips had been
11 arrested earlier in the same day for drug related activity by
12 Trojanowski, the initial arresting officer, defendants had
13 probable cause to arrest plaintiff.

14 Section 11532 is an anti-loitering statute. Before, the
15 officers may even consider factors relating to whether a person
16 is loitering in a manner and in circumstances that manifest an
17 intent to engage in drug-related activity, the officers must have
18 had probable cause to believe that the person was actually
19 loitering. See id. In this case, plaintiffs present evidence
20 that Marques was waiting for a locksmith with his mother in her
21 car. He approached a white van, which he thought belonged to the
22 locksmith. After determining that the van did not belong to the
23 locksmith, plaintiff was returning to his mother's car when he
24 was stopped and arrested by the officers. Plaintiff's actions in
25 walking to and from a white van is not enough for this court to
26 find that defendant officers had probable cause to arrest
27 plaintiff for loitering as a matter of law.

28 /////

1 Further, the circumstances surrounding plaintiff's prior
2 arrests for "drug-related activity" are disputed. Plaintiffs
3 contend that the arrests of Marques Phillips were only
4 tangentially related to drugs. Plaintiffs present evidence that
5 in none of the prior arrests were drugs found upon Marques
6 Phillips' person. Therefore, even if the officers had probable
7 cause to believe that plaintiff was loitering, defendants may not
8 have had an objectively reasonable basis for determining that
9 plaintiff had an intent to engage in drug-related activity under
10 § 11532.

11 **b. Excessive Force**

12 Plaintiffs also assert that, in addition to lacking probable
13 cause, defendants used excessive force in the arrest of Marques
14 Phillips. Defendants argue that some of the defendant officers
15 were not at the scene and that others did not actually touch
16 plaintiff.⁸ Defendants also argue that the force applied to
17 plaintiff was reasonable because (1) plaintiff appeared to the
18 officers to be resisting a lawful detention; (2) the officers had
19 just received word from dispatch that there was an armed man in
20 the parking lot; and (3) Trojanowski believed that Marques
21 Phillips had threatened violence on prior occasions.

22
23 ⁸ Plaintiffs present evidence that all defendant officers
24 were involved in the incident or present that night. (UF ¶¶ 66-
25 67). Plaintiffs are amenable to dropping claims against
26 defendant officers who could not be identified by either
27 plaintiff as involved in the alleged arrest and beating of
28 Marques Phillips. (SJ Hr'g). However, defendants have refused
to turn over photographs of defendant officers for identification
by plaintiffs. As was previously indicated to the parties, the
court would entertain a motion to reopen discovery to allow
plaintiffs the opportunity to identify those officers involved in
the alleged wrongful conduct.

1 Whether law enforcement officials used excessive force in
2 the course of making an arrest is properly analyzed under the
3 Fourth Amendment's objective reasonableness standard. Graham v.
4 Connor, 490 U.S. 386, 388 (1989).

5 Determining whether the force used to effect a
6 particular seizure is 'reasonable' under the Fourth
7 Amendment requires a careful balancing of 'the nature
8 and quality of the intrusion on the individual's Fourth
9 Amendment interests' against the countervailing
10 governmental interests at stake.

11 Id. at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

12 The reasonableness of a particular use of force must be evaluated
13 from the perspective of a reasonable officer on the scene. Id.

14 A proper application of the reasonableness inquiry

15 requires careful attention to the facts and
16 circumstances of each particular case, including the
17 severity of the crime at issue, whether the suspect
18 poses an immediate threat to the safety of the officers
19 or others, and whether he is actively resisting arrest
20 or attempting to evade arrest by flight.

21 Robinson v. Solano County, 278 F.3d 1007, 1013-14 (9th Cir. 2002)

22 (internal quotations omitted); see also McKenzie v. Lamb, 738
23 F.2d 1005, 1011 (9th Cir. 1984) (the determination requires the
24 analysis of factors such as "the requirements for the officers'
25 safety, the motivation for the arrest, and the extent of the
26 injury inflicted").

27 In this case, plaintiffs present evidence that defendants
28 inflicted a significant amount of injury upon Marques Phillips.
29 Plaintiff was ordered to get on the ground. Trojanowski trained
30 his gun on him and stomped the back of his neck. Trojanowski
31 then dropped down on top of plaintiff and drove his knee in his
32 back. Subsequently, plaintiff was handcuffed and his ankles were

1 restrained. Defendant officers punched, clubbed, kicked, and
2 slammed plaintiff into the ground multiple times. Plaintiffs
3 allege that as a result of this interaction, Marques Phillips
4 suffered numerous injuries.

5 Further, while plaintiffs have presented a triable issue of
6 fact regarding the existence of probable cause to arrest, the
7 arrest at issue was for a violation of California Health and
8 Safety Code Section 11532, which is a non-violent misdemeanor.
9 Therefore, the severity of the crime at issue weighs against the
10 use of force. While defendants contend that such force was
11 necessary to execute the arrest, plaintiffs present
12 countervailing evidence that Marques Phillips did not resist the
13 arrest and followed the officer's command to get down. Viewing
14 the evidence in the light most favorable to the non-moving party,
15 the lack of resistance weighs against the use of such force.

16 Finally, while defendants argue that Trojanowski believed
17 that Marques posed a threat to officer safety, plaintiffs present
18 evidence to the contrary. Defendants argue that Trojanowski and
19 officers heard a dispatch warning of an armed man in the vicinity
20 of the area where plaintiff was arrested. Plaintiffs dispute
21 whether any of the officers actually heard this dispatch. It is
22 also unclear whether a description of the "armed man" was given
23 and if so, whether the description matched the appearance of
24 plaintiff. (SJ Hr'g). Defendants also argue that Trojanowski
25 believed that Marques Phillips had threatened violence in the
26 past. Plaintiffs dispute that Marques Phillips previously
27 threatened violence against the police. Therefore, plaintiffs
28 have presented sufficient evidence to create a triable issue

1 regarding whether Trojanowski actually believed that plaintiff
2 posed a threat to officer safety or whether such belief was
3 reasonable.

4 Based upon the foregoing analysis, plaintiffs have presented
5 sufficient evidence to demonstrate that there is a triable issue
6 of fact regarding whether defendant officers had probable cause
7 to arrest Marques Phillips. Plaintiffs have also presented
8 evidence demonstrating a triable issue of fact regarding whether
9 excessive force was used in effectuating the arrest.

10 **c. Qualified Immunity**

11 Defendants argue that, even if the officers made a mistake
12 regarding probable cause or the amount of force required, they
13 are immune from suit based upon the doctrine of qualified
14 immunity. The doctrine of qualified immunity protects from suit
15 government officers who do not knowingly violate the law. Gasho
16 v. United States, 39 F.3d 1420, 1438 (9th Cir. 1994). Qualified
17 immunity is a generous standard designed to protect "all but the
18 plainly incompetent or those who knowingly violate the law."
19 Burns v. Reed, 500 U.S. 478, 495 (1991) (citation omitted). A
20 law officer can establish qualified immunity by demonstrating (1)
21 that the law governing the officer's conduct was not clearly
22 established at the time of the challenged actions, or (2) that
23 under the clearly established law, an officer could reasonably
24 have believed that the alleged conduct was lawful. See Katz v.
25 United States, 194 F.3d 962, 967 (9th Cir. 1999); Mendoza v.
26 Block, 27 F.3d 1357, 1360 (9th Cir. 1994); see also Harlow v.
27 Fitzgerald, 457 U.S. 800, 818 (1982) (observing that police
28 officers "are shielded from liability for civil damages insofar

1 as their conduct does not violate clearly established statutory
2 or constitutional rights of which a reasonable person would have
3 known").

4 The question of immunity generally is not one for the jury.
5 Qualified immunity "'is an immunity from suit rather than a mere
6 defense to liability' [Therefore,] [i]mmunity ordinarily
7 should be decided by the court long before trial." Hunter v.
8 Bryant, 502 U.S. 224, 228 (1991) (citation omitted). However, if
9 a genuine issue of material fact exists regarding the
10 circumstances under which the officer acted, then the court
11 should make the determination after the facts have been developed
12 at trial. Act Up!\Portland v. Bagley, 988 F.2d 868, 873 (9th
13 Cir. 1993).

14 The initial inquiry that the court must make to determine
15 whether an official is entitled to qualified immunity is whether,
16 "[t]aken in the light most favorable to the party asserting the
17 injury, do the facts alleged show the officer's conduct violated
18 a constitutional right?" Saucier v. Katz, 533 U.S. 194, 201
19 (2001) (citing Siegert v. Gilley, 500 U.S. 226, 232 (1991)).
20 Based upon the court's above analysis of defendant officers'
21 potential liability, the court has found that plaintiffs have
22 presented sufficient evidence for a reasonable juror to find that
23 a constitutional violation or violations did occur.

24 If, as in this case, a violation could be made out on a
25 favorable view of the parties' submissions, the next inquiry is
26 whether the constitutional right was clearly established. Id.
27 This inquiry must be taken in the light of the specific context
28 of the case. The contours of the right must be sufficiently

1 clear that a reasonable official would understand that what he is
2 doing violates that right. Id. However, this does not mean that
3 an official action is protected by qualified immunity unless the
4 very action in question has previously been held unlawful, but,
5 rather, in light of pre-existing law, the unlawfulness must be
6 apparent. Hope v. Pelzer, 536 U.S. 730, 739 (2002) (internal
7 citations omitted). The salient question is whether the law at
8 the time of the disputed conduct gave defendants "fair warning
9 that their alleged treatment of plaintiffs was unconstitutional."
10 See id. at 741. There must exist a clearly established rule so
11 that "it would be clear to a reasonable officer that his conduct
12 was unlawful in the situation he confronted." Saucier, 533 U.S.
13 at 205-06.

14 The conduct in question surrounds the arrest of Marques
15 Phillips on February 1, 2003. At this time, the law regarding
16 the fundamental right to be protected from unlawful arrests and
17 the use of unreasonable force in the execution of arrests was
18 clear. Individuals have a right to be free from unreasonable
19 seizures unless there is probable cause to arrest. See People v.
20 Ellison, 68 Cal. App. 4th 203, 211 (1998) (police must have
21 probable cause to arrest an individual pursuant to Section
22 11532). In this case, because plaintiffs have provided evidence
23 that Marques was not loitering and did not appear to be
24 loitering, the officers arrest of plaintiff under a loitering
25 statute would not be reasonable. See Saucer, 533 U.S. at 205-06.
26 Individuals also have a right to be free from the use of
27 excessive force in effectuating an arrest. See Mendoza v. Block,
28 27 F.3d 1357, 1361-62 (9th Cir. 1994) ("Officers have a

1 considerable amount of guidance from the courts in the
2 permissible use of force while making an arrest."). The use of
3 weapons, restraining individuals by force, handcuffing, and
4 throwing individuals against the ground is a violation of the
5 Fourth Amendment where the arrested individual did not resist
6 arrest and was not a risk to the safety of the arresting
7 officers. See McKenzie, 738 F.2d at 1010. Plaintiff presents
8 evidence that these were the circumstances of his arrest.

9 In light of the established state of the law at the time in
10 question, defendant officers had "fair warning that their alleged
11 treatment of plaintiff was unconstitutional." Hope, 536 U.S. at
12 741. Because there are triable issues of fact as to whether the
13 officers had probable cause to arrest Marques Phillips and
14 whether the force used to arrest Marques Phillips was
15 unreasonable, and because defendants had notice that their
16 alleged conduct was unconstitutional, the court cannot find that
17 defendant officers are entitled to qualified immunity at this
18 stage of the litigation.

19 Therefore, defendants motion for summary judgment regarding
20 the claims of plaintiff Marques Phillips against defendant
21 officers based upon Fourth Amendment violations is DENIED.

22 **2. Cynthia Phillips' Claims against Defendant Officers**

23 Plaintiff Cynthia Phillips asserts that defendant officers
24 violated her Fourth Amendment rights because they seized her
25 without reasonable suspicion and because Trojanowski used
26 excessive force when he trained a gun on her. Defendants contend
27 that Cynthia Phillips was never detained by the police, and
28 therefore, never seized. Defendants also contend that the use of

1 the gun was reasonable. Defendants assert that even if the
2 officers were mistaken in the alleged seizures or use of force,
3 the officers are protected by qualified immunity.

4 Plaintiffs assert that defendants seized Cynthia Phillips on
5 two occasions during the arrest of Marques Phillips. "[F]or
6 there to be a seizure there must be a restraint of liberty such
7 that the person reasonably believes her is not free to leave."
8 Robinson, 278 F.3d at 1013 (internal quotation omitted).

9 Plaintiffs present evidence that during the arrest of
10 Marques Phillips, Trojanowski trained a gun on Cynthia Phillips
11 while she sat in her car. Plaintiffs rely primarily on the Ninth
12 Circuit's decision in Robinson v. Solano County to justify their
13 claim that Trojanowski's training of his gun on plaintiff
14 constituted a seizure for purposes of the Fourth Amendment.
15 However, in Robinson, the fact of a seizure was not disputed.
16 Id. Further, in Robinson, the arresting officers pointed a gun
17 at plaintiff from a distance of 3-6 feet, and the officers
18 subsequently handcuffed plaintiff and placed him in the back of
19 the squad car. Id.

20 In United States v. Del Vizo, the Ninth Circuit held that
21 the defendant was "seized" where the police ordered him to step
22 out of his vehicle and handcuffed him while the officers were
23 brandishing weapons. 918 F.2d 821, 824 (9th Cir. 1990). In
24 United States v. Delgadillo-Velasquez, the Ninth Circuit ruled
25 that individuals were "seized" when police approached the
26 suspects with weapons drawn, ordered them to halt, and required
27 them to lie face down in the street while they were handcuffed.
28 856 F.2d at 1295. However, there is no authority supporting the

1 contention that pointing a gun at an individual, without more,
2 constitutes a seizure.

3 Plaintiffs also present evidence that Sergeant Schraer told
4 some of the officers to keep Cynthia Phillips back from Marques
5 Phillips, and the officers formed a half circle around her.
6 Plaintiffs contend that Cynthia Phillips retreated until she was
7 trapped behind the car door and that she reasonably believed she
8 was not free to leave her car.

9 The circumstances surrounding Trojanowski's use of a gun and
10 the officers' formation of a half circle around the plaintiff
11 demonstrate that Cynthia Phillips was not seized. Trojanowski
12 trained that gun at both Cynthia Phillips and Marques Phillips
13 during the arrest of Marques Phillips, which occurred within a
14 few feet of the car. An officer told Cynthia Phillips she could
15 get out of her car. When Sergeant Schraer ordered the officers
16 to keep plaintiff back, the officers did not keep her from
17 leaving, but prevented her from coming any closer to Marques
18 Phillips. Plaintiff was never ordered to get out of or stay in
19 the car, never physically touched by the officers, and never
20 physically restrained by the officers. A reasonable person would
21 have believed that she was free to stay in her car, leave her
22 car, or leave the vicinity. Defendant officers' action in
23 preventing her from approaching or intervening in the arrest of
24 Marques Phillips does not constitute a "seizure" for purposes of
25 the Fourth Amendment.

26 Because plaintiffs have not presented evidence that Cynthia
27 Phillips was seized, plaintiffs do not have colorable claims for
28 violations of Cynthia Phillips' Fourth Amendment rights. As

1 such, defendants' motion for summary judgment regarding Cynthia
2 Phillips' claims against defendant officers is GRANTED.

3 **3. Plaintiffs' Claims against Gresham**

4 Plaintiffs Marques Phillips and Cynthia Phillips contend
5 that Chief Gresham is liable under § 1983 in his individual
6 capacity for his actions and inaction. Specifically, plaintiffs
7 argue that Gresham failed to train the officers, failed to
8 supervise Trojanowski, and failed to discipline Trojanowski for
9 citizen complaints of excessive force.

10 In the case of a supervisor, "individual liability hinges
11 upon his participation in the deprivation of constitutional
12 rights." Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th
13 Cir. 1991). This participation may involve the setting in motion
14 of acts which cause others to inflict constitutional injury.
15 Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978). For the
16 court to hold defendant liable in his individual capacity,
17 plaintiffs must demonstrate: (1) that defendant's "own culpable
18 action or inaction in the training, supervision, or control of
19 his subordinates" caused the constitutional injury; (2) that the
20 defendant "acquiesce[d] in the constitutional deprivations of
21 which [the] complaint is made;" or (3) that his conduct showed a
22 "reckless or callous indifference to the rights of others." See
23 Larez, 946 F.2d at 646 (internal citations omitted).

24 Plaintiffs rely on Larez to substantiate their arguments
25 that Gresham should be held liable in his individual capacity.
26 The Larez court held that ratification by inaction in response to
27 a subordinate's conduct that violate's a plaintiff's
28 constitutional right may be sufficient to hold a supervisor

1 responsible for constitutional deprivations. Id. However, in
2 Larez, the police chief had significantly more involvement with
3 the constitutional violations than Gresham did. In Larez, there
4 was evidence that the chief created or maintained a policy by
5 which citizen complaints against officers were rarely sustained.
6 The plaintiffs in that case presented expert testimony that a two
7 year comparative study demonstrated that claims brought by the
8 police department against officers were almost always sustained
9 while complaints by citizens rarely were. Id. at 635. The
10 plaintiffs' expert witness, "armed with both many years practical
11 police experience and empirical data on police department
12 procedures and operations nationwide and in Los Angeles
13 specifically," testified that he would have disciplined the
14 officers and would have established new procedures so that the
15 violations did not occur in the future. Id. The plaintiffs in
16 that case also presented evidence that the police chief signed a
17 letter, informing the plaintiff that none of his complaints would
18 be sustained. Id.

19 Plaintiffs produce evidence that Trojanowski had six citizen
20 complaints against him for excessive force. Trojanowski was
21 investigated and exonerated for each claim. Further, plaintiffs'
22 civilian complaint was investigated and the officers involved
23 were exonerated. Plaintiffs contend that the investigation into
24 their complaint was "less than cursory." PLS.' Opp'n at 23.

25 The evidence presented by plaintiffs does not demonstrate
26 the type of acquiescence and ratification as in Larez to
27 establish a triable issue of individual liability for defendant
28 Gresham. Plaintiffs do not present any expert testimony that

1 Gresham created or maintained a policy whereby civilian
2 complaints of excessive force are meaningless. Plaintiffs have
3 not presented any evidence to demonstrate that the investigations
4 into the prior civilian complaints against Trojanowski or the
5 investigations into their own complaint against the officers was
6 cursory, inadequate, or meaningless. Plaintiffs have not
7 presented any evidence that Gresham acted in any way to condone
8 the use of excessive force against the plaintiffs or others.
9 Because plaintiffs have failed to present evidence to raise a
10 triable issue of fact, defendants' motion for summary judgment
11 regarding Gresham's individual capacity liability under § 1983 is
12 GRANTED.

13 **4. Plaintiffs' Claims against the City**

14 Both Marques Phillips and Cynthia Phillips assert that
15 defendant City of Fairfield is liable under § 1983. Under Monell
16 and its progeny, a plaintiff may hold a municipality liable under
17 section 1983 if his injury was inflicted pursuant to city policy,
18 regulation, custom, or usage. Chew v. Gates, 27 F.3d 1432, 1444
19 (9th Cir. 1994) (citing Monell, 436 U.S. at 690-91, 694). The
20 existence of a city policy may be established in one of three
21 ways:

22 First, the plaintiff may prove that a city employee
23 committed the alleged constitutional violation pursuant
24 to a formal governmental policy or a longstanding
25 practice or custom which constitutes the standard
26 operating procedure of the local governmental entity.
27 Second, the plaintiff may establish that the individual
28 who committed the constitutional tort was an official
with final policy-making authority and that the
challenged action itself thus constituted an act of
official governmental policy. Whether a particular
official has final policy-making authority is a
question of state law. Third, the plaintiff may prove
that an official with final policy-making authority

1 ratified a subordinate's unconstitutional decision or
2 action and the basis for it.

3 Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996) (quoting
4 Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992)
5 (citations and internal quotations omitted)). Assuming that a
6 plaintiff can establish one of these three circumstances, he must
7 then demonstrate that the municipal policy "caused" the
8 constitutional deprivation. Id. A municipal policy "causes"
9 injury where it is the "moving force" behind the violation.
10 Chew, 27 F.3d at 1444 (citing Monell, 436 U.S. at 690-91, 694).

11 Plaintiffs contend that city employees committed
12 constitutional violations pursuant to a formal governmental
13 policy or long standing practice of allowing excessive force by
14 officers. The sole evidence that plaintiffs present to
15 demonstrate this formal practice is a policy manual which
16 provides that officers "should never use unnecessary force."
17 Plaintiffs argue that the use of the word "should" in the policy
18 manual gives officers the discretion to use excessive force. The
19 court rejects plaintiffs' interpretation of the policy manual. A
20 plain reading of this phrase provides that it is the policy of
21 the City of Fairfield to prohibit the use of excessive force.
22 Therefore, plaintiffs' claims based upon a formal policy allowing
23 the use of excessive force are without merit.

24 Plaintiffs also contend that the city is liable because
25 Chief Gresham, as a final policy-making authority ratified the
26 officers' unconstitutional actions. Because, as discussed above,
27 plaintiffs have not demonstrated that Gresham ratified or

28 /////

condoned the officers' action, the city cannot be liable on this basis.

Because plaintiffs have failed to present evidence creating a triable issue of fact regarding municipal liability under § 1983 for the City of Fairfield, defendants' motion for summary judgment is GRANTED.

B. State Law Claims

1. Assault and Battery

Plaintiff Marques Phillips alleges claims of assault and battery against the defendant officers. California assault and battery claims are the counterpart to plaintiff's federal claims brought under § 1983. See Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1274 (1988). To sustain a claim of assault and battery against a police officer under state law, plaintiffs must provide evidence that the officer used unreasonable force. Id.⁹; See Johnson v. County of Los Angeles, 340 F.3d 787, 794 (9th Cir. 2003). For the reasons provided in the court's analysis of Marques Phillips' § 1983 claims against defendant officers, plaintiffs have raised a triable issue of fact that the defendant officers used unreasonable force.

Defendants argue that defendant officers are immune from plaintiff's state law claims of assault and battery pursuant to California Government Code § 821.6. Section 821.6 provides that

[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial administrative proceeding within the scope of his

⁹ While the Edson court addressed only the state law claim of battery, the court's reasoning can be extended to apply the same standard to the claim of assault. See Johnson v. County of Los Angeles, 340 F.3d 787, 794 (9th Cir. 2003).

1 employment, even if he acts maliciously and without
2 probable cause.

3 This immunity extends to actions taken in preparation for formal
4 proceedings, including investigations. Amylou R. v. County of
5 Riverside, 28 Cal. App. 4th 1205, 1209-10 (1994). The immunity
6 applies not only to injuries to the target of the judicial or
7 administrative proceeding, but also to injuries suffered by
8 others, such as witnesses or victims. Id.

9 Defendants argue that because Marques Phillips was arrested
10 during the officers' execution of a buy/bust operation, the
11 officers are immune pursuant to § 821.6. Plaintiffs do not
12 dispute that defendant officers were public employees or that
13 they were acting within the scope of their employment; such
14 elements are prerequisites to their § 1983 claims. However, the
15 conduct in this case was not incident to an investigation.
16 First, defendants assert that the officers were engaged in a *buy-*
17 *bust operation*, not an investigation in preparation for judicial
18 proceedings. Second, defendants do not contend that Marques
19 Phillips was implicated or related to the buy/bust operation in
20 any way. Plaintiff's only relation to the investigation was to
21 walk through the parking lot where defendant officers were. This
22 case does not present the type of factual circumstances in which
23 § 821.6 has been held to apply. See Karam v. City of Burbank,
24 352 F.3d 1188 (9th Cir. 2003); Baughman v. State of California,
25 38 Cal. App. 4th 182 (1995); Amylou R., 28 Cal. App. 4th 1205.

26 Therefore, because plaintiffs have presented evidence that
27 defendant officers used unreasonable force against Marques
28 Phillips, and because § 821.6 immunity does not apply,

1 defendants' motion for summary judgment regarding plaintiff's
2 state law claims of assault and battery is DENIED.

3 **2. False Arrest and Imprisonment**

4 Plaintiff Marques Phillips also claims that defendant
5 officers are liable under state law for false arrest false
6 imprisonment. "[T]he basis for the tort of false imprisonment is
7 the unlawful restraint of another's liberty." Scofield v.
8 Critical Air Medicine, Inc., 45 Cal. App. 4th 990, 1000 (1996).

9 For the reasons provided in the court's analysis of Marques
10 Phillips' § 1983 claims against defendant officers, plaintiffs
11 have raised a triable issue of fact that the defendant officers
12 lacked probable cause to arrest Marques Phillips. Therefore,
13 California Civil Code § 43.55, which provides immunity to
14 officers who detains a suspect based upon probable cause that he
15 committed a crime, is inapplicable. Because the court has found
16 the § 821.6 immunity is also inapplicable to this case,¹⁰
17 defendants' motion for summary judgment regarding Marques
18 Phillips' state law claims of false arrest and imprisonment is
19 DENIED.

20 **3. Respondeat Superior Liability of the City**

21 Plaintiffs claim that the city is liable under state law
22 pursuant to the doctrine of *respondeat superior*. Plaintiffs
23 assert that the officers committed the alleged acts within the
24 course and scope of their employment as police officers for the
25 city. Therefore, the city is vicariously liable. Defendants

26 ¹⁰ Further, § 821.6 does not provide immunity for claims
27 of false imprisonment. Amylou R., 28 Cal. App. 4th at 1211 n.2
28 (citing Sullivan c. County of Los Angeles, 12 Cal. 3d 710, 719-22
(1974)).

1 move for summary judgment on the grounds that under Cal. Gov.
2 Code § 815.2(b), a public entity cannot be held liable for an
3 injury resulting from an act or omission of an employee of the
4 public entity where the employee is immune from liability.
5 Defendants assert that defendant officers are immune under §
6 821.6.

7 Cal. Gov. Code § 815.2(a) provides that a city is liable for
8 acts and omissions of its employees under the doctrine of
9 respondeat superior to the same extent as a private employer.
10 Unlike the rule against municipal liability under federal law set
11 out Monell, California imposes liability on municipalities under
12 the doctrine of *respondeat superior*. Robinson, 278 F.3d at 1016.
13 Under California law, a city's immunity depends upon whether the
14 police officers are immune. Id.

15 For the reasons provided in the court's analysis of Marques
16 Phillips' § 1983 claims against defendant officers, plaintiffs
17 have raised a triable issue as to whether the police officers,
18 while operating in the course of their employment, used
19 unreasonable force in the seizure and arrest of Marques Phillips.
20 Further, defendant officers are not immune under § 821.6. Thus,
21 under Cal. Gov. Code § 815.2(a), liability may flow to the city
22 for defendant officers' actions toward Marques Phillips.
23 Accordingly, defendants' motion for summary judgment for the
24 *respondeat superior* claim brought by Marques Phillips is DENIED.
25 Because plaintiffs have failed to present evidence that creates a
26 triable issue of fact regarding an unreasonable search and
27 seizure of Cynthia Phillips, defendants' motion for summary
28 /////

1 judgment regarding the *respondeat superior* claim brought by
2 Cynthia Phillips is GRANTED.

3 **CONCLUSION**

4 Based on the foregoing analysis, the court makes the
5 following orders:

6 A. As to the claims brought by plaintiff Marques Phillips:

7 1. Defendant officer's motion for summary judgment is:

8 (a) DENIED as it applies to plaintiff's § 1983 claims
9 based upon violations of his Fourth Amendment
10 rights;

11 (b) GRANTED as it applies to plaintiff's § 1983 claims
12 brought under all other bases;

13 (c) GRANTED as it applies to plaintiff's § 1981
14 claims;

15 (d) GRANTED as it applies to plaintiff's state law
16 claims brought under Cal. Civ. Code § 51.7;

17 (e) GRANTED as it applies to plaintiff's state law
18 claims brought under Cal. Civ. Code § 52.1;

19 (f) GRANTED as it applies to plaintiff's negligence
20 claims;

21 (g) DENIED as it applies to plaintiff's assault and
22 battery claims;

23 (h) DENIED as it applies to plaintiff's false arrest
24 and imprisonment claims

25 2. Defendant Gresham's motion for summary judgment is:

26 (a) GRANTED as it applies to all of plaintiff's
27 claims;

28 /////

3. Defendant City of Fairfield's motion for summary judgment is:

(a) GRANTED as it applies to plaintiff's § 1983 claims;

(b) GRANTED as it applies to plaintiff's claims of negligent selection, training, retention, supervision, investigation, and discipline.

(c) DENIED as it applies to plaintiff's *respondeat superior* claims;

B. As to the claims brought by plaintiff Cynthia Phillips:

1. Defendant officer's motion for summary judgment is:

(a) GRANTED as it applies to all of plaintiff's claims addressed in the motion for summary judgment;¹¹

2. Defendant Gresham's motion for summary judgment is:

(a) GRANTED as it applies to all of plaintiff's claims;

3. Defendant City of Fairfield's motion for summary judgment is:

(a) GRANTED as it applies to all of plaintiff's claims.

IT IS SO ORDERED.

DATED: December 21, 2005

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

¹¹ Defendants did not address plaintiffs' claim for intentional infliction of emotional distress in their motion for summary judgment. Therefore, the court does not address this claim.